

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

201

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,184

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUL 15 1959

545
ANDERSON JONES,

Joseph W. Stewart

CLERK
Appellant,

v.

545
UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(i)
INDEX

	<u>Page</u>
Indictment	1
Plea of Defendant	2
Motion for Suppression of Evidence	3
Points and Authorities in Support of Petitioner's Motion for Suppression of Evidence	4
Excerpts from Transcript of Proceedings	6
<u>Witnesses:</u>	
	<u>Tr. Page</u>
Anderson Jones	
Direct	3
Cross	10
Eldon E. Ernst	
Direct	15
Cross	18
Joseph William Somerville	
Direct	21
Cross	26
Redirect	28
Motion to Suppress Evidence	29
Joseph William Somerville	
Direct	38
Cross	46
Redirect	51
Virgil J. Hood	
Direct	52
William P. Butler	
Direct	59
Charge to the Jury	74
Sentence	82
Verdict	33
Judgment and Commitment	34
Petition for Leave to Appeal from Judge 6/30/58 in Forma Pauperis Pursuant to Sec. 1915, Title 28, U.S.C.	35
Notice of Appeal	36
Order Denying Petition for Leave to Appeal in Forma Pauperis	37

JOINT APPENDIX

PLEADINGS AND DOCUMENTARY EVIDENCE

[Filed May 5, 1958]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled February 27, 1958, Sworn in on March 4, 1958

The United States of America

v.

Anderson Jones

Criminal No. 467-'58

Grand Jury No. 324-58

Vio. 26 U. S. C. 4704a, 4705a
21 U. S. C. 174

[INDICTMENT]

The Grand Jury charges:

On or about May 22, 1957, within the District of Columbia, Anderson Jones did sell, barter, exchange and give away to Charles P. King a narcotic drug, that is, three capsules containing a mixture totaling about four grains of heroin hydrochloride, quinine hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said Charles P. King, as provided by law.

SECOND COUNT:

On or about May 22, 1957, within the District of Columbia, Anderson Jones sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, three capsules containing a mixture totaling about four grains of heroin hydrochloride, quinine hydrochloride and milk sugar. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

THIRD COUNT:

On or about May 22, 1957, within the District of Columbia, Anderson Jones facilitated the concealment and sale of a narcotic drug, that is,

three capsules containing a mixture totaling about four grains of heroin hydrochloride, quinine hydrochloride and milk sugar, after said heroin hydrochloride had been imported, with the knowledge of Anderson Jones, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first and second counts of this indictment.

FOURTH COUNT:

On or about March 6, 1958, within the District of Columbia, Anderson Jones sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is six glassine bags containing a mixture totaling about 55.9 grains of heroin hydrochloride, milk sugar and mannitol.

FIFTH COUNT:

On or about March 6, 1958, within the District of Columbia, Anderson Jones facilitated the concealment and sale of a narcotic drug, that is, six glassine bags containing a mixture totaling about 55.9 grains of heroin hydrochloride, milk sugar and mannitol, after said heroin hydrochloride had been imported, with the knowledge of Anderson Jones, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the fourth count of this indictment.

/s/ Oliver Gasch

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Hazel H. Feagaris

Deputy Foreman.

[Filed May 9, 1958]

PLEA OF DEFENDANT

On this 9th day of May, 1958, the defendant Anderson Jones, appearing in proper person and by his attorney Lowell J. Bradford (Not present), being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District Jail.

By direction of

HENRY A. SCHWEINHAUT

Presiding Judge
Criminal Court #7

HARRY M. HULL, Clerk

Present:

United States Attorney

By Fred McIntyre

Assistant United States Attorney

J. Rawls

Official Reporter

By /s/ H. G. Dodd
Deputy Clerk

[Filed June 6, 1958]

MOTION FOR SUPPRESSION OF EVIDENCE

Anderson Jones hereby moves this Court to direct that certain property, described in Counts 4 and 5 of the indictment, and which on the early evening of March 6, 1958, at the Union Station, Washington, D. C., was unlawfully seized and taken from him by two members of the Narcotics Squad, Metropolitan Police of the District of Columbia, whose true names are unknown to the Petitioner, be confiscated or detained, and that it be suppressed as evidence against him in any criminal proceeding.

The Petitioner further states that the property was seized against his will, incident to an arrest without a warrant and without probable cause.

PIERSON, BALL & DOWD

By /s/ Lowell J. Bradford

Attorneys for Petitioner
1007 Ring Building
Washington 6, D. C.

Tel. No. REpublic 7-2566

POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S
MOTION FOR SUPPRESSION OF EVIDENCE

The Petitioner, through his attorneys, respectfully submits that certain property or any part thereof described in Counts 4 and 5 of the indictment, namely six (6) bags containing 55.9 grains of heroin hydrochloride, be suppressed as evidence in the above-entitled criminal proceeding. As grounds, therefore, the Petitioner states:

1. The Fourth Amendment of the Constitution of the United States declares that "the right of the people to be secure in their persons, houses, papers and effects against unlawful searches and seizures shall not be violated. . . ."

2. The Fifth Amendment of the Constitution of the United States declares that "no person shall be compelled in any Criminal Case to be a witness against himself."

3. Rule 4(e), Federal Rules of Criminal Procedure states that "a person aggrieved by an unlawful search and seizure may move . . . to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. . . ."

4. Facts necessary to uphold and arrest without a warrant must be sufficiently strong to support issuance of a warrant for arrest, and an arrest or warrant may not be based upon suspicion of some person unsupported by personal knowledge. Worthington v. United States, 166 F.2d 55, (6th Cir. 1948).

5. If a search of a person is made incident to an arrest, which arrest is unlawful because of lack of probable cause, anything found as a result of a search of such person is inadmissible as evidence against him. Hernandez v. U.S., 17 F.2d 373, (9th Cir. 1927).

6. Probable cause for an arrest is defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. 2 R. C. L. 45.

7. Arrest and search without a warrant cannot be justified by an officer acting on hearsay information, but he must have personal

knowledge of facts showing probable cause. Worthington v. United States, supra.

8. Property described in Counts 4 and 5 of the indictment was obtained as a result of a search of Petitioner's person after an arrest made without a warrant and without probable cause. The officers who arrested Petitioner at Union Station on March 6, 1958, acted solely upon hearsay information obtained from persons who had no official capacity as informants. The officers had no personal knowledge of the facts related, and at the time of his arrest, Petitioner was not violating any law in a visible manner. Thus, there could have been no reasonable suspicion on the part of the arresting officers that a felony was being committed.

9. For the above reasons, the property described in Counts 4 and 5, having been obtained from Petitioner as a result of a search incident to an unlawful arrest, should be detained or confiscated and suppressed as evidence.

PIERSON, BALL & DOWD

By /s/ Lowell J. Bradford

Attorneys for Petitioner

1007 Ring Building
Washington 6, D. C.

Tel. No. REpublic 7-2566

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

June 10, 1958

[Filed June 9, 1959]

1 The above-entitled matter came on for trial before the HONOR-
 ABLE JOSEPH C. McGARRAGHY, United States District Judge, at
 1:45 o'clock p. m.

APPEARANCES:

On behalf of the Government:

HAROLD H. TITUS, JR.

Assistant United States Attorney

On behalf of the Defendant:

LOWELL J. BRADFORD, ESQ.

and

DAVID MACHANIC, ESQ.

* * * * *

3 PROCEEDINGS

THE DEPUTY CLERK: United States vs. Anderson Jones,
 Criminal 467-58.

MR. TITUS: The Government is ready, Your Honor.

MR. BRADFORD: The defense is ready.

THE COURT: Do you have a motion?

MR. BRADFORD: Yes, to suppress evidence.

THE COURT: Very well.

* * * * *

ANDERSON JONES

was called as a witness and, having been first duly sworn, was examined
 and testified as follows:

4 DIRECT EXAMINATION

BY MR. BRADFORD:

* * * * *

Q. Directing your attention to this March of 1958, did there
 come a time during the month of March of '56 when you were arrested?

A. Yes, there was.

* * * * *

A. It was March 6th, 1958 and I had just arrived at the Union Station about 5:00 p. m.

5 Q. From where? A. New York.

Q. What happened at Union Station at about 5:00 p. m., on March 6th? A. As I was coming through the Station, I met Officer Somerville and he walked up to me and said that I was under arrest and I asked about what, at the time, and he took me to the side and was searching me. He took a package out of my pocket, a package of heroin and carried me from there to the Precinct and charged me with possession of drugs.

Q. Where had you been prior to 5:00 o'clock of that day? A. I was on a train coming from New York.

Q. How long were you in New York? A. From about eleven that day until five.

Q. Only on that day, is that correct? A. Yes.

Q. Where were you living at that time? A. 1807 Belmont Road, Northwest.

Q. 1807 Belmont Road, Northwest? A. Yes.

Q. Was Officer Somerville known to you? A. Yes, he had seen me before.

Q. Was he alone? A. Yes.

6 Q. Was any warrant or official paper or document authorizing your arrest shown to you at the time you were arrested? A. No, there wasn't.

Q. Where were you taken? A. To No. 1 Precinct.

Q. Was there Officer Aiken -- Does that name mean anything to you, Aiken? A. He was there.

Q. Where? A. At the Precinct.

Q. At the Precinct. Was he at the Station or was he not? A. No, he was not.

Q. And by Station, I mean Union Station. A. Yes.

Q. Did either Officer Somerville or Officer Aiken give you any reason for your arrest? A. No, they did not.

Q. Did Officer Somerville explain to you why you were being apprehended at Union Station, in any manner? A. No. He said I was under arrest. After he taken me to the side and said I was under arrest for possession.

7 Q. Do you have any personal knowledge of why Officer Somerville was waiting at the Union Station at 5:00 o'clock? Do you know why he was there, or not? Do you have any personal knowledge? A. No.

Q. Do you know of your own personal knowledge where Officer Somerville had been prior to his visit to Union Station at 5:00 o'clock? A. He had been to my home.

Q. How do you know that, Mr. Jones? A. I was told that by some of my relatives.

Q. You were told this prior to your arrest or after your arrest? A. After my arrest.

Q. Do you know how long Officer Somerville had remained at your home? A. Not him but some other officers were there from perhaps two to about six.

Q. Do you know if Officer Somerville went to your home with the intention of talking to you, originally? A. I couldn't be sure of that.

Q. And you had been in New York for how long? A. From about 11:00 o'clock.

Q. That was 11:00 o'clock in the morning? A. Yes, it is.

8 Q. Do you know, of your own personal knowledge, why the police officers came to your home? A. No, I don't.

Q. Do you know who these police officers saw when they came to your home? A. Yes.

Q. Who were they? Were they relatives, your family or friends? A. Friends.

Q. Do you know what these police officers did when they got to your home? A. Only what I was told.

Q. Only what you were told? A. Yes. They came in and took a fellow by the name of Gerald Tompkins and were going to charge him with vagrancy under the Harrison Narcotic Act.

Q. In other words, they arrested Mr. Tompkins at your home?

A. Yes.

Q. Do you know whether these police officers were advised of your whereabouts at this time? A. They said so but I can't be sure.

9 Q. Has anyone advised you that the police officers were informed concerning your arrival from New York? A. Well, when I come back to the Precinct, Officer Aiken said, well, if I wouldn't somebody else will.

Q. I didn't understand. A. When I arrived at the Preceinct, Officer Aiken said if I wouldn't, someone else will, meaning if I wouldn't get somebody, somebody else will get me.

MR. TITUS: I couldn't hear that at all.

THE COURT: I had difficulty hearing you, myself. What did you last say?

BY MR. BRADFORD:

Q. Keep your voice up. A. I said, when I arrived at the Precinct, Officer Aiken told me if I wouldn't get somebody, somebody will get me, and that is all.

Q. Do you know why Officer Somerville was waiting for you at 5:00 o'clock at Union Station? Did anyone advise you as to why he was there? Did he tell you or did any one of the police officers go into that point at the Station? A. No, they didn't.

Q. Do you know whether or not someone at your home advised Officer Somerville that you were returning from New York at a particular time? Do you know that? A. I don't know, but that is my thought.

10 Q. Has anyone advised you that they told Officer Somerville that you were coming in to Union Station at 5:00 o'clock? A. No.

MR. BRADFORD: That is about all we have, Your Honor.

CROSS EXAMINATION

BY MR. TITUS:

Q. How much heroin did you have in your -- what was it, a jacket you were wearing? A. A sweater.

Q. And where did you have the heroin? A. In my sweater pocket.

Q. How much heroin did you have? A. Six bags.

Q. Six cellophane envelopes? A. Yes.

Q. With heroin in each envelope? A. Yes.

Q. Were you alone when you came in from New York on the train? A. No.

Q. Who were you with? A. A couple of fellows out of New York.

* * * * *

11 Q. When you were placed under arrest, what other officers were there besides Officer Somerville? A. There was no other officer.

Q. No other officer? A. Right.

Q. You knew why he was arresting you, didn't you? A. No, I didn't.

Q. You knew you had heroin on you, didn't you? A. Yes, I knew I had heroin on me.

Q. Do you think you are allowed to carry heroin? A. No. I said I am not allowed to carry it but he is not allowed to take it off of me, see.

Q. That is all I want. Are you the same Anderson Jones who, in 1956, was convicted of violation of the Narcotic Act here in the District of Columbia?

MR. BRADFORD: Object, Your Honor.

THE COURT: Overruled.

BY MR. TITUS:

Q. That was October 6, 1956, here in the District of Columbia?

A. The Uniform Narcotic Act?

Q. Yes. A. Yes.

12 * * * * *

Q. Are you the same Anderson Jones who, in Prince Georges County, Maryland, was convicted of two counts of petit larceny on or about January 9, 1956? A. Yes.

Q. Are you the same Anderson Jones who, around February of 1953, was convicted of larceny here in the District of Columbia? A. No.

Q. The original charge of robbery and yoking? A. No.

Q. And you got one year. Do you recall that? A. That was in '52.

Q. 1952? A. Yes.

Q. Were you the same one? A. Yes.

Q. That was larceny, was it? A. Yes.

Q. Are you the same Anderson Jones who, on or about March 12, 1954, was convicted of attempted procuring of prostitution here in the District of Columbia? A. Yes.

* * * * *

13 THE COURT: One thing I don't understand. What happened when you came off the train? What was the first thing the officer did?

THE WITNESS: He grabbed my hand, my wrist.

THE COURT: And then said you were under arrest?

THE WITNESS: No. I asked him what he wanted. He taken me to another spot where people weren't walking and then told me I was under arrest.

* * * * *

(At the bench:)

MR. TITUS: Your Honor, this officer will testify in substance, or he is going to testify -- I wanted to bring this to the Court's attention -- that he had received information from an informant in New York who had called him on the phone, a reliable informant whom he had known

14 before. This informant goes by a name which the officer merely knows as a certain nickname. He does not want to disclose the name of that particular informant for the reasons that the informant has been a good source of information and also, apparently, in the back there is a person who seems to know a person involved in the narcotic traffic and he may be here, the officer feels, for learning who the informant is. So, for that reason, it may be dangerous to mention the name. I would prefer not to mention the name.

THE COURT: Very well.

MR. BRADFORD: Our position, that we gained from the Defendant's story in the jail on the probable-cause angle only, which is germane to what Mr. Titus has just stated, is that one of his relatives merely advised Officer Somerville that he was coming in from a trip, that there was no other probable cause such as you have mentioned.

I didn't want to go into the name of your informant but it is important as to probable cause as to why this officer was there. We claim he was merely advised this man was coming in.

THE COURT: I don't think the officer should have to identify the informant by name.

MR. BRADFORD: I agree with that, Your Honor.

* * * * *

15

ELDON E. ERNST

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

* * * * *

Q. Specifically, on the date of March 6, 1958, did there come an occasion when you received a telephone call with certain information relative to the present case of Anderson Jones? A. Yes, sir, I did.

Q. Would you tell the Court about what time you received the call?

16 A. I received a telephone call, a long distance call at approximately 3:00 or 3:15 p.m., in the afternoon of March 6th.

Q. Was that to your office here in the District of Columbia?

A. That was direct to my office and to my desk.

Q. That call came from New York, am I correct? A. That is right.

Q. Without going into the name of the person who called you, was he a person whom you had known previous to that? A. I have known my source of information for over five years.

Q. Has this same source of information on prior occasions given you information which you have verified as being trustworthy, either in other criminal cases or other activities? A. Yes, sir. In five years, I have never gotten a wrong piece of information from my informant.

Q. Of an undercover agent? A. Of an undercover agent.

Q. Have you, yourself, been able to verify the accuracy of the information you received during the past five years from this same source? A. On every occasion.

17 Q. Has it been true? A. It has been true on every occasion.

Q. What information did you receive from this source on the date of March 6, 1958? A. I received information to the effect that Anderson Jones was in New York City; that he had purchased narcotics, the amount was unknown, but that he was taking a train back from New York City to Washington, D. C., and should arrive here around 4:30 p.m., on the afternoon of March 6th.

Q. At around 4:30? A. Around 4:30.

Q. That information was given to you, I believe you testified, between 3:00 and 3:15 P.M.? A. Yes, sir. He had already left the City of New York.

Q. That would give you approximately a little over an hour until the time that the train was supposed to arrive? A. Yes, sir.

Q. After you received that information, what did you do with it?
A. I knew that other officers in the Squad were working on an investigation concerning this Defendant. I attempted to get in touch with them. It was Officer Somerville and his partner. They were in Court and did not get
18 out until around ten minutes of four and it was almost 4:00 o'clock when I finally contacted them.

Q. Who did you contact? A. I contacted Officer Somerville in person as soon as he came in the office and I asked him if he knew Anderson Jones by sight and he said, yes, he did.

* * * * *

Q. Did you tell Officer Somerville the information you had?

A. I told him the information I had received but not its source.

Q. Based on the information that you gave to Officer Somerville, did he leave the Narcotics Squad Office? A. He left almost immediately. There was maybe ten minutes leeway. He was looking for a cruiser, to the best of my knowledge, and couldn't get one, and I think he finally left in a taxicab to get to the Station, the Union Station.

* * * * *

CROSS EXAMINATION

BY MR. BRADFORD:

19 Q. Officer, when this telephone call was made to you from New York, was there a statement made to you relative to a gathering at Anderson Jones' ? A. Yes, sir.

Q. You didn't know when you got this call that the police officers were on the premises of Anderson Jones or had been that day? A. No, I was in Court myself. I had no connection with this case other than the telephone call.

Q. In other words, you were not actively working on this particular case? A. No, sir. I happened to be on a hospital case and that was my main concern.

Q. Could it have been possible that other officers were in the home of Anderson Jones that day? A. It could have been possible. They could have been any place. I have no personal knowledge.

Q. You don't have any personal knowledge? A. No.

Q. Did it come to your attention, in the course of your official work with Officer Somerville, that Officer Somerville went down to the Union Station as a result of being advised by one of the relatives or friends of Anderson Jones in Washington? A. Not to my knowledge.

20 The only thing that I gave him, insofar as I know what Private Somerville went on, was the information that I had given him. If he had any other source of information, I didn't know about it any more than he knew about mine.

Q. You didn't go into any other details, other than reporting the substance of your phone call from New York? A. Other than the fact that he knew Anderson Jones by sight and I didn't and the man could have walked right past me and I wouldn't have known it.

I knew Private Somerville was working on an investigation. What it was, I didn't know. All I knew was he was working on one.

Q. Do you know whether Officer Aiken was at the home of Anderson Jones that day? A. No, sir, I don't.

Q. He was Officer Somerville's partner? A. No; he could have been. There has been a switch of partners of those two teams. I am not sure who was where on that particular day. I only know I was in the Courthouse that day.

Q. If there was testimony here today that there were several police officers who were interested in narcotics offenses and were at the home of Anderson Jones, you have no personal knowledge of that, is that correct? A. No, sir, none whatsoever.

21 Q. If there was testimony that Police Officer Somerville went down to Union Station on the advice of a person in the home or in the premises of Anderson Jones on that day, you are not in position to deny it? A. I am not in position to affirm it, either.

Q. You are not in position to deny it? A. No, sir. The only time I saw Officer Somerville was after he got out of Court.

Q. You are not in a position to affirm or deny it? A. That is correct.

MR. BRADFORD: That is all.

* * * * *

JOSEPH WILLIAM SOMERVILLE

was called as a witness and, having been first duly sworn, was examined and testified as follows:

MR. TITUS: Your Honor, may I point out to the Court something which occurred to me just now and which should have been pointed out before? As Your Honor will note from the indictment, there are a total of five counts. This Motion --

THE COURT: Refers to the fourth and fifth counts?

22 MR. TITUS: Only to the last two counts.

DIRECT EXAMINATION

BY MR. TITUS:

* * * * *

Q. I want to ask you, Officer, and answer this in general, if you had known the Defendant Anderson Jones by sight prior to March 6, 1958. A. I did.

Q. With respect to the date of March 6, 1958, did you receive information concerning the activities and the whereabouts of the Defendant, Anderson Jones, at any time during the day? A. I did.

Q. Would you tell us approximately what time it was you first received the information as to his whereabouts? A. About 4:00 p.m.,

in the office of the Narcotic Squad, I received information from Detective Ernst, and as a result--

23 Q. What was the information you received? A. I received information that Anderson Jones, he had gone to New York to get some heroin and that he was due back on or about 4:30, on the 4:30 train that afternoon.

Q. Where, the Union Station? A. At Union Station.

Q. Pursuant to that information, what did you do? A. I caught a cab and went to Union Station.

Q. What time did you get there, approximately? A. I arrived at the Union Station approximately at 4:30 p. m.

Q. Did you make a check on the trains? A. I did.

Q. What did you find? A. I found that the train was due in at 4:50 p. m.

Q. That afternoon? A. That same afternoon.

Q. Did you wait there? A. I did.

Q. Where did you wait? A. I waited just inside of the station.

Q. That is, the Concourse? A. That is in the Concourse.

Q. Did there come a time when you saw the Defendant? A. I did.

24 Q. What happened and what took place? A. As I was standing just inside the doors of the Station in the Concourse, I observed Anderson Jones walking with a newspaper held up before his face.

Q. Show the Court how he was walking. A. He had the newspaper up in this manner (indicating) walking up to the Station. As he came through the door, I spoke to him and I said, "Hi, Anderson." And he said, "How the hell did you know I was here?"

At that time I walked up to him and placed him under arrest and asked him what he had. I could see part of a brown paper bag in his right sweater pocket.

Q. Part of a brown paper bag in what? A. In the right sweater pocket.

Q. Go ahead. A. He stated, "You know what I have," and at that time I took the brown paper bag from the sweater pocket and I looked in

it and saw some glassine bags containing a white powder. At that time, I told him to go to the police room in Union Station.

Q. To go to the police room in Union Station? A. That is correct.

Q. Did you take him to that room? A. I did.

25 Q. When you got to that room, did you have a conversation with him? A. I did.

Q. Concerning the narcotics? A. I did.

Q. How long had you been on the Narcotics Squad prior to March 6, 1958? A. I had been assigned to the Narcotics Squad since about October of 1956.

Q. In relation to your prior time when you say you saw the Defendant, Anderson Jones, when was that? A. I first saw Anderson Jones about 5:00 p.m., when I placed him under arrest.

Q. I don't mean on that date. You said you had seen him some time before. A. Yes, I had.

Q. When was that? A. That was on January 30, 1958.

Q. Was that here in the District of Columbia? A. It was.

Q. Were you investigating narcotics then? A. Yes, I was.

* * * * *

26

CROSS EXAMINATION

BY MR. BRADFORD:

Q. Are you familiar with one Jerry Tompkins? A. Yes, I am.

Q. That name means something to you, Officer? A. Yes, sir.

Q. Who was Jerry Tompkins? A. I was with Officer Aiken about a couple of weeks ago when we placed him under arrest.

Q. Where was that, what premises, if you know? A. I think he has been known to me in the field of narcotics for about, well, some time, and about two weeks ago Officer Aiken brought him to the office of the Narcotics Squad.

Q. Directing your attention to March 6th, the day that this Defendant, Anderson Jones, was arrested by you, had you seen Jerry Tompkins that day? A. Not to my knowledge.

Q. Were you at premises 1807 Belmont Road, Northwest, at any time that day, on March 6th? A. No, I was not.

Q. Where were you? A. I was in Court.

Q. You were testifying in Court in another case? A. Yes, sir.

27 Q. Were there any officers in your Squad, to your knowledge, on premises 1807 Belmont Road, Northwest, on the day this Defendant was arrested? A. Not to my knowledge.

Q. It was stated or testified here in Court that Tompkins advised the officials that Anderson Jones was coming back at a certain hour from New York; would you be in a position to say one way or the other? A. I couldn't affirm nor deny it.

Q. Did you know where he lived? A. 1806 Belmont Road, Northwest.

Q. How did you know where he lived? Had you been there prior to this arrest? A. Yes, I had.

Q. How shortly prior? A. I was there on January 30, 1958, when we served an arrest warrant on him.

Q. But you haven't been there since that date, is that correct? A. I think I have been there once after that.

Q. What time did the other police officer advise you that a telephone call had come in from New York? A. It was about 4:00 p.m.

28 Q. You had gotten out of Court and gone back to your office, is that correct, Officer? A. Yes, sir, that is correct.

Q. Is Officer Aiken here with you today? A. No, he is not.

Q. Would you be in a position to affirm or deny testimony here in Court to the effect that Jerry Tompkins told Officer Aiken that this Defendant was coming in from New York City earlier on the morning of March 6, 1958? Can you affirm or deny that? A. I can't say. I have no knowledge.

* * * * *

REDIRECT EXAMINATION

BY MR. TITUS:

Q. Assume, from what Mr. Bradford has asked you, assume some information came from Jerry Tompkins. Did you make your arrest based on that information given you by Detective Ernst? A. That is correct.

Q. Did you have any other information concerning the Defendant,

one way or the other? A. No, I did not.

MR. TITUS: That is all. That is the Government's case as far as the arrest is concerned.

29 THE COURT: Do you want to be heard on this at all?

MR. BRADFORD: Just shortly, if Your Honor please. May it please the Court, on the Motion to Suppress, I humbly submit that the probable cause that a felony had been committed, on the grounds of a telephone call from New York, would not give the authority to make such a seizure and arrest which was made on March 6, 1958 at Union Station; that there was sufficient time to acquire a warrant and to comply fully with the Court of Appeals Decisions.

There was plenty of time, even when the Police Officers were in Court, to secure a warrant. I think there is probable cause to grant the Motion.

THE COURT: I will deny the Motion.

* * * * *

(At the bench:)

MR. TITUS: Your Honor, as you know, this is Mr. Caputy's case and I took the case only this morning and we can only present the case on the last two counts.

The officer involved in the first three counts is not here today and Judge Laws was so informed this morning. Mr. Caputy indicated at that time that we would only be able to proceed to trial on the last transaction, the one we have heard. So, consequently, that is all I am ready to try at

30 this time. I don't know what Judge Laws decided as to the other three counts.

THE COURT: What would you suggest?

MR. TITUS: It would necessitate a severance.

* * * * *

32 (Thereupon, the Motion to Suppress Evidence was concluded.)

* * * * *

THE COURT: Mr. Titus, are you moving for a severance at this time?

33 MR. TITUS: I think we should, Your Honor, under the circumstances.

THE COURT: I will declare a severance and go to trial on the 4th and 5th counts.

MR. BRADFORD: Yes, Your Honor.

* * * * *

38

JOSEPH WILLIAM SOMERVILLE

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

* * * * *

Q. Are you attached to the Narcotics Squad of the Metropolitan Police Department? A. I am.

Q. For how long have you been attached to that particular Squad?

39

A. Since October of 1956.

Q. And were you attached to that Squad on March 6, 1958? A. I was.

Q. Officer Somerville, on the date of March 6, 1958, did there come an occasion when you left to go to the Union Station located here in the District of Columbia? A. There was.

* * * * *

Q. What time, about, did you leave? A. I left, it was about 4:00 p.m.

Q. And how did you go to the Union Station? A. I caught a cab.

Q. About what time was it that you say you got to the Union Station? A. I would say it was about 4:15 or 4:20 p.m.

Q. And after arrival at the Union Station -- that was in the afternoon, at 4:15 in the afternoon? A. Yes.

Q. After arriving at the Union Station that afternoon, did there come an occasion when you saw the Defendant in this case, seated at counsel table, Anderson Jones? A. There was.

Q. About what time would you say that was? A. That was about 5:00 p.m.

40

Q. Where did you first see him? A. I first saw Anderson Jones as he was coming down the aisle, coming down the aisle from the train and coming into the Concourse into the Station.

Q. Coming into the Concourse? A. Yes.

Q. From where the train pulls in? A. That is correct.

Q. Were you standing at that time? A. I was standing just inside the door.

Q. You were standing just inside the door? A. Yes.

Q. At the time you saw the Defendant, how was he attired? What was he wearing? A. Anderson Jones had on a hat. He had on a sweater, one of these heavy wool sweaters with a roll-type collar.

Q. And did you have a conversation with him when you first saw him? A. I did.

Q. As a result of that conversation, did there come a time when you placed the Defendant under arrest? A. There was.

41 Q. About what time would you say that was? A. That was almost immediately.

Q. Within a minute or two? A. Within a minute, yes.

Q. And when you placed him under arrest, did you see anything on his person beside the sweater, at that time? A. I did.

Q. What was that? A. I saw a brown paper bag sticking in the pocket of his sweater, the right hand pocket.

Q. Did you have occasion to remove that bag from his sweater?
A. I did.

Q. When was that? A. When I saw him.

Q. After you had placed him under arrest? A. After I had placed him under arrest.

Q. Did you open the brown paper bag there at the Station to see what was in it? A. I did.

Q. What was in it? A. There were six small glassine bags containing a white powder.

Q. Containing a white powder? A. That is correct.

42 Q. Had you seen any narcotic drugs before that time? A. I had.

Q. Was that white powder similar to narcotic drugs that you had

seen? A. It was.

Q. Let me ask you this: After you had taken the brown paper bag and had seen these glassine bags with this white powder, where did you then take the Defendant? A. I took the Defendant to the police room in Union Station.

Q. In the Union Station? A. That is correct.

Q. And when you saw these glassine bags with this white powder, did you see any tax stamps of any kind and, by tax stamps, I mean Federal Narcotic Stamps that would be on legitimate narcotic drugs? A. No, I did not.

Q. Were any stamps on any of those packages? A. There were not.

Q. Were there any tax stamps on the brown bag you saw sticking in his pocket? A. There were none.

Q. How long did it take you to get back to the police room at the Union Station, the building? A. After I placed him under arrest and
43 searched him, it was about three minutes, three or four minutes.

Q. When you got back there, did you call for any assistants or take the Defendant anywhere? A. I called for transportation to transport him to the office of the Narcotics Squad.

Q. What did you do with the brown paper bag and the glassine bags that were contained in that brown bag? A. I kept those in my possession until I arrived at the office of the Narcotics Squad.

Q. What did you do with them there? A. There I turned them over to Officer Hood.

Q. Officer Virgil Hood? A. Officer Virgil Hood.

Q. He is of the Narcotics Squad, also? A. He is of the Narcotics Squad.

MR. TITUS: With the Court's permission, may the large envelope be marked as Government's Exhibit 1 and the small brown bag marked as Government's Exhibit 1-A, for identification?

THE COURT: Very well.

(Large brown envelope and small brown envelope were marked Government's Exhibits 1 and 1-A, for identification.)

44

BY MR. TITUS:

Q. Officer Somerville, look at Government's Exhibit 1-A, the small envelope, and tell us whether you have seen that before, sir.

A. I have.

Q. Will you look at the contents of that brown bag and tell us whether you have seen the contents before? A. I have.

Q. How many of the small packages are there in the brown bag?

A. There are six.

Q. How do you recognize those as having seen them before, Officer Somerville? A. I initialed this cellophane wrapper which contained the six bags of white powder. I initialed this bag which contained the cellophane wrappers.

Q. When did you initial those? I initialed those upon returning to the office of the Narcotics Squad.

Q. Is that March 6th of 1958? A. March 6th, before I turned them over to Officer Hood.

Q. Did you have occasion to talk with and discuss the contents of this package with the Defendant at the Union Station before the Defendant was taken by the -- what was it? A. Patrol wagon.

45

Q. -- from the Station? A. I did.

Q. What, if anything, did the Defendant have to say at that time? A. I asked the Defendant what was in the bags and he said, "You know what it is." I asked him where did he get it and he stated that he had gotten it in New York from a fellow called "Lee."

Q. Lee? A. Lee; and he stated that he had paid \$10 a bag for each one of those small bags, he paid \$10 apiece making a total of \$60.

Q. For each one of those? A. Each one of those. He also stated that he had gone to New York on March 5 to purchase a half an ounce and the fellow said it would be about four or five p.m. the next afternoon before he could get it so he took what the man had.

Q. Which consisted of these (indicating)? A. That is correct.

* * * * *

BY MR. BRADFORD:

Q. Officer, how did you receive the information that Jones would be at Union Station at 5:00 o'clock --

MR. TITUS: Excuse me.

(Conference between counsel.)

MR. BRADFORD: I can clear that up and ask it this way.

BY MR. BRADFORD:

Q. Did it ever come to your attention that the Defendant was being investigated at his home by police officers, other than officers on your Squad, on the same day?

MR. TITUS: May we approach the bench, Your Honor?

THE COURT: Yes.

(At the bench:)

MR. TITUS: Your Honor, in all fairness to Mr. Bradford, I want to say this: I am afraid you are opening the door to a lot of background information because this has been argued on suppression.

THE COURT: What is the purpose?

MR. BRADFORD: My only ground is this, Judge: I argued this upstairs but I feel there is law only on the question of the unidentified informant. I don't want to know who he is.

47 THE COURT: I do not think you need to go into that at this posture of the case. You made your record on that before me. The question of the validity of the arrest has already been passed on by the Court as a matter of law. If I committed error, there is a chance to have it reviewed. I do not think this jury is concerned with that question.

MR. TITUS: No, they are not. I didn't want to make a flat objection because I didn't want them to think I am cutting you off, but you are opening the door and I object now.

MR. BRADFORD: I didn't want to go into that.

THE COURT: I don't think you should go into the question of the arrest, as to whether it was a valid arrest or not. It is not a matter for the jury. It is a matter of law.

MR. BRADFORD: I agree with that and Your Honor has already ruled and you would preclude me from going into that at this time.

THE COURT: I think so, yes. I think that the only question here is a question which goes into the matter of credibility. If there is any question of credibility, perhaps you should be permitted to go into that.

MR. BRADFORD: I didn't have that in mind, not at all.

48 THE COURT: I sustain the objection.

* * * * *

49 BY MR. BRADFORD:

Q. I believe you stated that at the time you interrogated the Defendant relative to what was in the bag, he said, "You know"? A. That is correct.

Q. And then you got into a discussion as to where he got this. Did he further identify this man named "Lee" in any manner? A. He gave me a phone number connected with Lee.

Q. Was that a New York phone number or Washington phone number? A. That was a New York phone number.

50 Q. Do you have that in your possession? A. It is over at the Narcotics Squad office.

Q. It is in the possession of your office? A. Yes.

* * * * *

51 REDIRECT EXAMINATION

BY MR. TITUS:

* * * * *

Q. Was the field test, to your knowledge, performed in your presence by Detective Hood? A. Yes, there was.

Q. Were you present at that time? A. I was.

52 Q. And did you see the results of the field test? A. I did.

Q. What did it show? A. The field test indicated by a positive color reaction the presence of an alkaloid of the opiate group.

Q. Which would be a narcotic? A. That is right.

* * * * *

VIRGIL J. HOOD

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

* * * * *

53 Q. I am going to show you two exhibits, Detective Hood. I am going to show you, first, Government't Exhibit 1- A, a brown bag and its contents, and then Government's Exhibit 1, for identification. Will you look at 1-A, that is, the small bag, first, and tell us if you have seen that bag and its contents before? A. Yes, I have.

Q. How do you recognize them as having seen them before, Detective Hood? A. I recognize this bag by my initials and the date on which I saw it.

Q. What does it show? A. "V.J.H." my initials and the date "March 6, '58."

* * * * *

54 Q. What did you do with the contents of the glassine bags when you received them? A. I took a quantity of powder from one of the bags and tested it, made a preliminary test.

Q. What did it show? A. It showed that the contents, by color, were of the alkaloid group.

Q. The opiate group? A. That is right, sir.

55 Q. What did you do with the brown paper bag and the tin seal and the glassine bags? What did you do with them? A. I placed the glassine bags back in this, placed them in the bag and made an analysis report and placed the bag and its contents in this manila envelope here (indicating).

* * * * *

Q. And where you have the opening at the top of that envelope, was that sealed after you placed the brown bag in it? A. Yes, it was. It was sealed.

Q. What did you do with the large envelope, Government's Exhibit 1, when you finished sealing it? A. I took it to the Bureau of Internal Revenue and turned it over to the chemist, Dr. Butler.

Q. Dr. William Butler? A. That is right, sir.

56 Q. That was for the purpose of his performing a chemical analysis of the contents? A. That is right, sir.

Q. At the time you saw and received this small brown bag, the wrapper and the six glassine bags from Officer Somerville, did they have any tax stamps on them at all? A. No, they did not.

* * * * *

MR. BRADFORD: May we approach the bench, Your Honor?

THE COURT: Yes.

(At the bench:)

MR. BRADFORD: Your Honor, the Defendant seems to be weakening on this original question of the plea and he asked me a very unusual question which I thought I had better bring to the attention of the Court and my good friend here. He said, "Would you explain why you couldn't go into that particular bit of evidence," as Your Honor has ruled, and he thoroughly understood it. He said, "I might as well take one of these
57 two counts on the plea" but I would certainly like to go up to the Court of Appeals on that Motion. I said, "You can't go two ways, son. You have got to make up your mind."

There is no doubt in his mind, either, that this evidence is completely cold and completely strong against him. He has absolutely no doubt whatsoever. He has told me that three times.

I am a little bit on the horn of a dilemma. I don't want to ignore any reasonable request of his and I want to do what I can by him.

The next request I would like to make is to be able to sit down with him. He can't go both ways.

THE COURT: I don't know what the position of the Government will be after you conclude your case, whether the Government will take a plea.

MR. TITUS: At the conclusion of my case, yes, I will. I don't want to be ridiculous about it and waste the Court's time any more than this.

All you can do is explain to him.

THE COURT: You have only one other witness, the chemist?

MR. TITUS: Yes.

THE COURT: Will you stipulate his qualifications as a chemist?

58

MR. BRADFORD: Yes.

THE COURT: Why don't you have the chemist and then I will adjourn until tomorrow.

MR. BRADFORD: And that will let him think it over. I never heard of a man before trying to go both ways.

THE COURT: I would be disinclined for the case to go to the jury today, anyway.

MR. TITUS: The only thing that concerns me is this: I have had so many cases where things of this nature have happened where they plead guilty under duress.

THE COURT: I am disinclined to take the plea. I think probably we had better let it go to the jury.

It is perfectly clear that this Defendant understands all of his rights. He doesn't feel he has any case to go to the Court of Appeals but if he thinks he has a case to go to the Court of Appeals, you had better guide him to go that way.

MR. BRADFORD: He was heartbroken with Your Honor's ruling relative to opening this evidence in front of the jury regarding the seizure, et cetera.

THE COURT: Suppose you do this: Let the Government conclude its case and then we will adjourn until tomorrow morning and if you have anything to take up with the Court, take it up at that time.

* * * * *

59

WILLIAM P. BUTLER

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TITUS:

* * * * *

Q. What is your position, Dr. Butler? A. I am employed by the Internal Revenue Service of the Treasury Department as a chemist.

* * * * *

60

THE COURT: You stipulate his qualifications, Mr. Bradford?

MR. BRADFORD: Yes.

* * * * *

61 Q. Did you perform a chemical analysis on the contents of the six small packets? A. I did.

Q. What did you find they contained? A. Each one of the small glassine envelopes contained a mixture of heroin hydrochloride, milk sugar and mannitol, the heroin being a derivative of opium and a narcotic drug.

Q. How many grains in total did you find? A. The total was 55.9 grains net weight for the six envelopes.

Q. And the heroin hydrochloride, which you spoke of, you said was a derivative of opium and is a narcotic drug, is that correct? A. Yes, sir.

* * * * *

62 MR. TITUS: Your Honor, at this time the Government will offer into evidence Government's Exhibits 1-A and 1. Actually, we aren't concerned with 1-A.

MR. BRADFORD: No objection.

THE COURT: They will be received.

(Government's Exhibits 1 and 1-A,
previously marked for identification,
were received in evidence.)

MR. TITUS: Your witness.

MR. BRADFORD: I have no questions.

(Witness excused.)

MR. BRADFORD: Will we be allowed to approach the bench just one moment, sir?

THE COURT: Yes.

63 (At the bench:)

MR. BRADFORD: I just want to get this thoroughly understood on the Court's ruling.

I am precluded from cross examining these witnesses the Government has produced at the trial with respect to identity of the informant and the nature of the seizure on the grounds the Court has already ruled on the Motion to Suppress, is that correct?

THE COURT: That is correct.

MR. BRADFORD: I wanted to clear that up in my own mind and, therefore, I have no questions at this time.

(In open Court:)

MR. TITUS: The Government rests its case.

* * * * *

67 MR. BRADFORD: May we approach the bench, Your Honor?

THE COURT: Yes.

(At the bench:)

MR. BRADFORD: The Defendant has seen me this morning, Judge, and we have had a long 20-minute talk. He has thought it over and he has absolutely no reservations whatsoever. He said he is really killing himself. He is hitting himself on the head with a hammer, he says, and I thoroughly agree with him. He said he would like to plead to Count 4, he has no reservations and his plea is completely voluntary on his part as he will so state to Your Honor.

I have been talking to Mr. Titus and Mr. Titus has a thought on which count to plead.

THE COURT: Frankly, I am very much concerned about taking a plea in this case. I have thought about it over night and it seems to me that what transpired yesterday pretty clearly indicates that it is not voluntary on his part. I do not think I should take a plea.

MR. TITUS: I want to say that I agree with Your Honor and Mr. Bradford understands.

68 I was telling Mr. Bradford, for his own protection as well as the Court's time, I do not think a plea should be taken. He will be back with a 2255.

THE COURT: I have thought about it over night and it is perfectly clear to me that any plea he made would be in some form of compulsion or duress.

MR. BRADFORD: We might hear about it later.

MR. TITUS: Of course, we cannot prevent him from pleading to two counts. I don't see how he could be prevented in view of the severance. I am sure he has that right but I know I couldn't do it now in good

conscience.

THE COURT: He indicates that he may think the Court committed some error on the Motion to Suppress and he may have some other rights that should be protected and they would be protected only if the case went to the jury. I think we will let the jury pass upon it.

Is the Defendant going to take the stand?

MR. BRADFORD: No, Your Honor.

THE COURT: Do you have any witnesses?

MR. BRADFORD: No, sir.

THE COURT: This closes the case, then?

MR. BRADFORD: Yes.

THE COURT: Do you have any prayers for instructions?

MR. BRADFORD: The standard ones.

69 THE COURT: Do you want me to comment on his failure to take the stand?

MR. BRADFORD: No, sir. I would prefer not to.

THE COURT: All right.

* * * * *

70 THE COURT: Mr. Bradford, before Mr. Titus proceeds, does the defense rest?

MR. BRADFORD: Yes, Your Honor.

* * * * *

74 CHARGE TO THE JURY

* * * * *

81 THE DEPUTY CLERK: Mr. Foreman, has the jury reached a verdict?

THE FOREMAN: We have, sir.

THE DEPUTY CLERK: What say you as to the Defendant Anderson Jones on Count 4?

THE FOREMAN: Guilty.

THE DEPUTY CLERK: And on Count 5?

THE FOREMAN: Guilty.

THE DEPUTY CLERK: Members of the jury, your foreman says

that you find the Defendant, Anderson Jones, guilty on Counts 4 and 5, and so say you each and all?

(The jury nodded assent.)

82

SENTENCE

June 27, 1958.

THE DEPUTY CLERK: Anderson Jones.

THE COURT: Mr. Jones, do you have anything you want to say as to why sentence should not be imposed?

THE DEFENDANT: I would like to be recommended to Lexington, Kentucky.

THE COURT: I think you were there once before.

MR. BRADFORD: Yes, Your Honor, he was there once before.

THE COURT: Mr. Bradford, do you want to say anything?

MR. BRADFORD: Your Honor will recall, although there was some confusion in Jones' mind, the Defendant did attempt to plead twice and although that is hardly a mitigating circumstance, it does show that he was truthful.

I have never seen a defendant so bluntly truthful, if that is any mitigation.

THE COURT: My recollection is at one stage of the trial the Defendant wanted to plead to one count but it seemed inappropriate.

He was convicted on Counts 4 and 5.

MR. BRADFORD: The last two counts, yes, sir.

THE COURT: On Count 4, the sentence will be two to seven years.

83 On Count 5, seven years to run concurrently with the sentence on Count 4.

The first three counts were dismissed.

MR. BRADFORD: The first three counts were dismissed, yes, Your Honor.

THE COURT: They were dismissed at trial time.

MR. BRADFORD: Yes, sir.

THE COURT: As a matter of fact, I do not think they were, in fact, dismissed. I think the Government said they were prepared to go

forward only with Counts 4 and 5.

MR. BRADFORD: That is correct.

MR. HANTMAN (Assistant District United States Attorney): It has not been done and the Government now moves to dismiss the first three counts.

THE COURT: Yes, they will be dismissed.

* * * * *

[Filed June 11, 1958]

VERDICT

On this 11th day of June 1958 came the parties aforesaid in manner as aforesaid and the same jury as aforesaid in this cause the hearing of which was respited yesterday; whereupon after hearing further of the evidence and arguments of counsel, the alternates are discharged and the jury retires to consider their verdict; and thereupon the said jury returns into open Court and upon their oath say that they find the defendant guilty on Counts 4 and 5.

The case is referred to the Probation Officer of the Court and the defendant is remanded to the District Jail.

By direction of

JOS. C. MCGARRAGHY
Presiding Judge
Criminal Court #4

HARRY M. HULL, Clerk

By /s/ Wm. Collins, Jr.
Deputy Clerk

Present:

United States Attorney

By Harold Titus
Assistant United States Attorney

* * *

[Filed June 30, 1958]

JUDGMENT AND COMMITMENT

On this 27th day of June, 1958 came the attorney for the government and the defendant appeared in person and by counsel, Lowell Bradford, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

VIO. Title 26, Sec. 4704a, U. S. Code;
Title 21, Sec. 174, U. S. Code

as charged in Counts 4 and 5 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Two (2) years to Seven (7) years on Count Four;
Seven (7) years on Count Five; said sentence by
the counts to run concurrently.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Joseph C. McGarraghy
United States District Judge

*

*

*

*

[Filed July 2, 1958]

PETITION FOR LEAVE TO APPEAL FROM
JUDGE 6/30/58 IN FORMA PAUPERIS
PURSUANT TO SEC. 1915, TITLE 28, U.S.C.

I, Anderson Jones, being first duly sworn according to law, depose and say that I am the defendant in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay costs of said appeal.
3. That I am unable to give security for the same.
4. That I believe I am entitled I seek in said appeal.
5. The the nature of my cause of action is briefly stated as follows:

a. That the police or Narcotic agent who arrested petitioner on March 6, 1958, was without the necessary authority to do so, - that is to say he was without a warrant issued in accord with the provisions of Rule 4(A) and (b)(1) of the Federal Rules of Criminal Procedure.

b. That the petitioner believes the court erred when it denied a motion to suppress the evidence that was obtained as a result of the above-stated illegal arrest.

c. That the Narcotic agent Ernest gave false and untrue testimony at petitioner's trial but because of the shortness of the trial the petitioner was unable to get his witness there to refute that testimony and it prejudiced his defense.

/s/ Anderson Jones

PROOF OF SERVICE

I, the above-named defendant, hereby state that on this ___ day of ___, 1958, there was sent to the attorney for the government, Mr. Oliver Gasch a copy of the foregoing petition at his last known address, the United States District Court for the District of Columbia, U. S. Courthouse, Washington 1, D. C.

/s/ Anderson Jones

Subscribed and Sworn to before me this 1st day of July 1958.

/s/ (Illegible)

Notary Public, D. C.

Let the defendant proceed
without prepayment of cost.

Judge

[Filed July 2, 1958]

NOTICE OF APPEAL

Name and address of appellant

Anderson Jones
200 - 19th Street, S. E., Washington 3, D. C.

Name and address of appellant's attorney

Appellant is without counsel.

Offense

Violation 21 U.S.C. 174 (Possession of Narcotic Drug).

Concise statement of judgment or order, giving date and sentence

On June 27, 1958, the appellant was sentenced to two (2) to seven (7) years.

Name of institution where now confined

District of Columbia Jail

I, the above-named appellant, hereby appeal to the United States

Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date: 7-1-58

/s/ Anderson Jones
Appellant

None

Attorney for Appellant

[Filed August 27, 1958]

**ORDER DENYING PETITION FOR LEAVE TO
APPEAL IN FORMA PAUPERIS**

This case having been referred to trial counsel for defendant pursuant to Local Criminal Rule 92-A, and said counsel having advised the Court that in his opinion no substantial question exists, and the Court being of the opinion that there is no substantial question raised which would justify granting the application to proceed without prepayment of costs, it is, this 27th day of August, 1958

ORDERED that the defendant's petition for leave to appeal in forma pauperis be, and is hereby, denied.

/s/ Joseph C. McGarraghy
JUDGE

BRIEF FOR APPELLEE

United States Court of Appeals
For the District of Columbia Circuit

No. 15,184

812

ANDERSON JONES, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court for the
District of Columbia

OLIVER GASCH,
United States Attorney.

CARL W. BELCHER,
LEWIS CARROLL,
*Assistant United States
Attorneys.*

United States Court of Appeals
For the
District of Columbia Circuit

FILED AUG 17 1959

Joseph W. Stewart

CLERK

No. 15,184

QUESTIONS PRESENTED

In the opinion of appellee, the following question is presented:

Whether information from a confidential source found reliable over a period exceeding five years, coupled with corroboration of such information, constituted probable cause to arrest appellant in a narcotics case?

INDEX

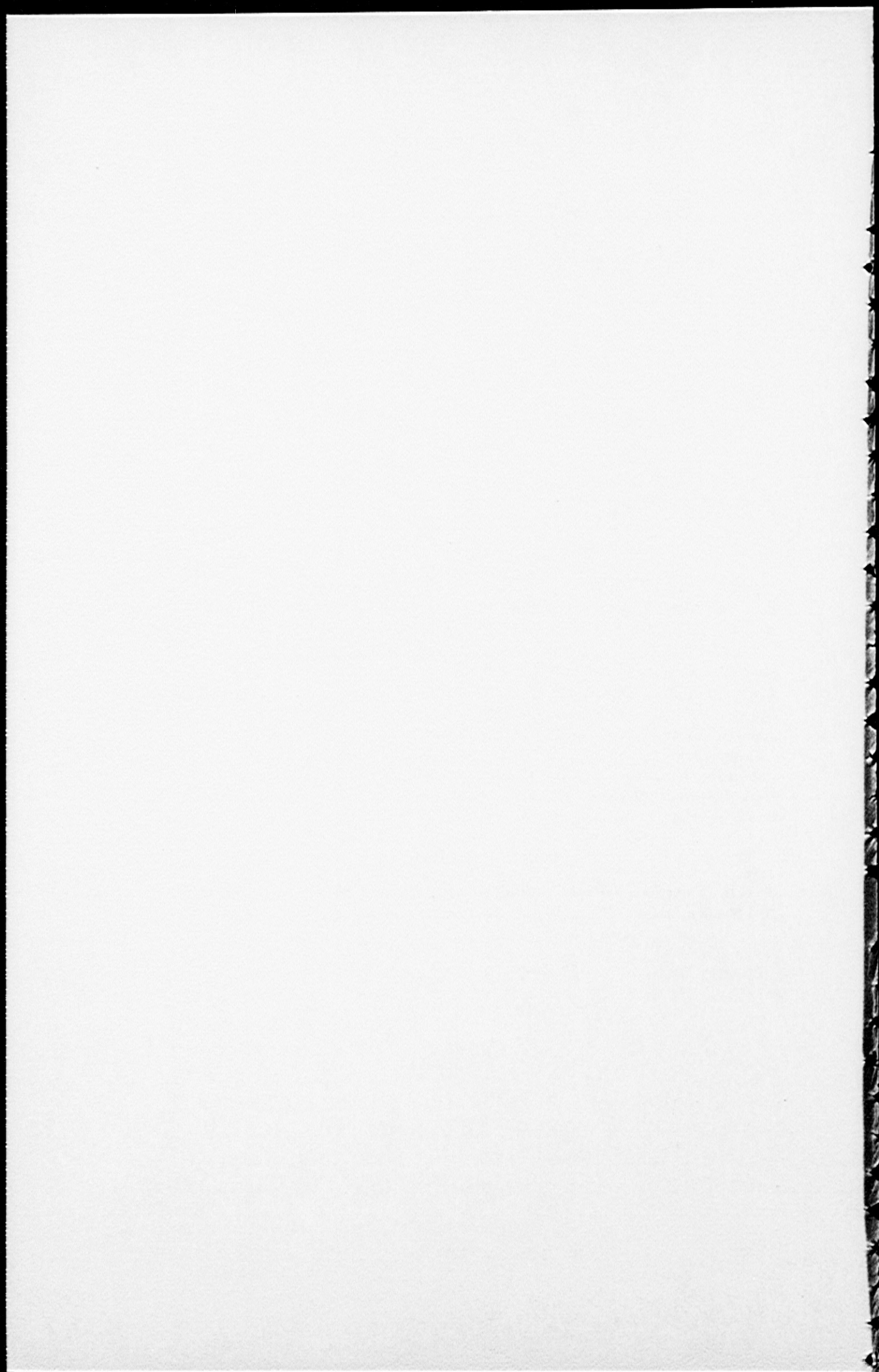
	Page
Counterstatement of the Case	1
Statutes Involved	4
Summary of Argument	5
Argument:	
<i>The Narcotics Were Seized In A Search Which Was Incident To A</i> <i>Legal Arrest</i>	6
Conclusion	8

TABLE OF CASES

<i>Agnello v. United States</i> , 269 U.S. 20	6
<i>Brandon v. United States</i> , — U.S. App. D.C. — (No. 14464, July 9, 1959)	7
<i>Carroll v. United States</i> , 267 U.S. 132	6
<i>Draper v. United States</i> , 358 U.S. 307 (1959)	5, 6, 7, 8
<i>Giordenello v. United States</i> , 357 U.S. 480	6
<i>Jones v. United States</i> , — U.S. App. D.C. — (Misc. No. 1103, April 30, 1959)	1, 7
<i>Roviaro v. United States</i> , 353 U.S. 53 (1957)	6, 7
<i>United States v. Kancso</i> , 252 F.2d 220 (1958)	7
<i>Weeks v. United States</i> , 232 U.S. 383	6

OTHER REFERENCE

2 U.S. Congressional and Administrative News, 84th Cong., Second Session, 1956, 3274, 3297, 3299	7
---	---



**United States Court of Appeals
For the District of Columbia Circuit**

No. 15,184

ANDERSON JONES, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

**Appeal From the United States District Court for the
District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This appeal involves the conviction of appellant on two counts of a five count narcotics indictment, the remaining three counts having been dismissed (J.A. 1-2, 32-33). Appellant was represented by two court appointed attorneys below (J.A. 6), and is represented by other court-appointed counsel at the present time. See *Jones v. United States*, — U.S. App. D.C. — (Misc. No. 1103, April 30, 1959).

A motion to suppress was filed prior to trial (J.A. 3-5), and the matter came on for hearing on June 10, 1958 (J.A. 6). Officer Eldon E. Ernst (J.A. 12-15), while at his desk, received a long distance call from New York at approximately 3:00 or 3:15 p.m. on March 6, 1958. He was told by

a source of information known to him for over five years and whose information has been "true on every occasion" that appellant had purchased an unknown quantity of narcotics in New York, was enroute to Washington and should arrive here at about 4:30 p.m.¹ Officer Ernst was working on a hospital case and had no knowledge or information concerning appellant or his activities. However, he did know that Officer Somerville and other detectives were investigating appellant. Accordingly, he contacted Officer Somerville and, at about 4:00 p.m. after the Officer and his partner returned from court, gave him the information obtained from the long distance call. Officer Somerville then went to Union Station by taxicab, arriving at about 4:30 p.m. A check of train schedules revealed that the next train was due at about 4:50 p.m., so the officer waited in the concourse. After the train arrived and "As I was standing just inside the doors of the Station in the Concourse, I observed Anderson Jones walking with a newspaper held up before his face. * * * As he came through the door, I spoke to him and I said, 'Hi, Ander-

¹ The following bench conference is to be noted (J.A. 11-12) (Emphasis added):

MR. TITUS: Your Honor, this officer will testify in substance, or he is going to testify—I wanted to bring this to the Court's attention—that he had received information from an informant in New York who had called him on the phone, a reliable informant whom he had known before. This informant goes by a name which the officer merely knows as a certain nickname. He does not want to disclose the name of that particular informant for the reasons that the informant has been a good source of information and also, *in the back there is a person who seems to know a person involved in the narcotic traffic and he may be here, the officer feels, for learning who the informant is.* So, for that reason, it may be dangerous to mention the name. I would prefer not to mention the name.

THE COURT: Very well.

MR. BRADFORD: Our position, that we gain from the Defendant's story in the jail on the probable-cause angle only, which is germane to what Mr. Titus has just stated, is that one of his relatives merely advised Officer Somerville that he was coming in from a trip, that there was no other probable cause such as you have mentioned. I don't want to go into the name of your informant but it is important as to probable cause as to why this officer was there. We claim he was merely advised this man was coming in.

THE COURT: I don't think the officer should have to identify the informant by name.

MR. BRADFORD: *I agree with that, Your Honor.*

son.' And he said, 'How the hell did you know I was here?' " At that time I walked up to him and placed him under arrest and asked him what he had. I could see part of a brown paper bag in his right sweater pocket." (J.A. 16). The Officer knew appellant from prior investigations (J.A. 17). Appellant testified that he was on the train, having gone to New York that same day, and that he had the six cellophane envelopes containing heroin at the time he was arrested (J.A. 9-10).²

Immediately after the motion was denied, trial on the merits was had on the last two counts of the indictment (J.A. 19-20). Complete testimony as to the events and the testing of the unstamped narcotics was introduced (J.A. 20-23, 25-27, 28-29). During the cross-examination of Officer Somerville, the following took place at the bench (J.A. 24-25):

Mr. Titus: Your Honor, in all fairness to Mr. Bradford, I want to say this: I am afraid you are opening the door to a lot of background information because this has been argued on suppression.

The Court: What is the purpose?

Mr. Bradford: My only ground is this, Judge: I argued this upstairs but I feel there is law only on the question of the unidentified informant. *I don't want to know who he is.*

The Court: I do not think you need to go into that at this posture of the case. You made your record on that before me. The question of the validity of the arrest has already been passed on by the Court as a matter of law. If I committed error, there is a chance to have it reviewed. I do not think this jury is concerned with that question.

Mr. Titus: No, they are not. I didn't want to make a flat objection because I didn't want them to think I am cutting you off, but you are opening the door and I object now.

Mr. Bradford: I didn't want to go into that.

The Court: I don't think you should go into the question of the arrest, as to whether it was a valid

² Appellant also admitted being convicted of violations of the narcotic law in 1956; petit larceny in 1956; larceny in 1953; and attempted procuring of prostitution in 1954 (J.A. 10-11).

arrest or not. It is not a matter for the jury. It is a matter of law.

Mr. Bradford: *I agree with that* and Your Honor has already ruled and you would preclude me from going into that at this time.

The Court: I think so, yes. I think that the only question here is a question which goes into the matter of credibility. If there is any question of credibility, perhaps you should be permitted to go into that.

Mr. Bradford: I didn't have that in mind, not at all.

The Court: I sustain the objection.

Thereafter, and at the conclusion of the evidence, counsel for appellant made the following comments at the bench (J.A. 29-30):

Mr. Bradford: I just want to get this thoroughly understood on the Court's ruling.

I am precluded from cross-examining these witnesses the Government has produced at the trial with respect to identity of the informant and the nature of the seizure on the grounds the Court has already ruled on the Motion to Suppress, is that correct?

The Court: That is correct.

Mr. Bradford: I want to clear that up in my own mind, and, therefore, I have question at this time.

Appellant, through his attorney, made an attempt to enter a plea of guilty to one count but the trial court refused to entertain the request (J.A. 27, 30-31).

STATUTES INVOLVED

Title 26, United States Code, Section 4704(a) provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotics drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 21, United States Code, Section 174, provides:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any

territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

SUMMARY OF ARGUMENT

A detective received a long-distance telephone call from a confidential source of information in New York City. He was advised that appellant was enroute to Washington with an unknown quantity of heroin and would arrive about 4:30 p.m. on a train. This information was relayed to another officer who knew appellant and this officer arrived at the station at about 4:30. The next train was due at 4:50 and, at that time, appellant came off the train when it arrived. A bag was observed in his pocket. He was arrested and searched. The heroin seized was introduced against him in evidence after the trial court ruled, after a hearing, that the arrest was lawful.

The Supreme Court has recently ruled that facts and circumstances similar to those herein are sufficient to create probable cause. *Draper v. United States*, 358 U.S. 307 (1959). The identity of the source of information is not involved in this case because (1) appellant's right to prepare his defense on the merits was not hampered by nondisclosure, (2) the person furnishing the information did not set up the commission of the crime and was not present at its occurrence, (3) appellant did not ask for the name nor did he make any attempts to have the court produce the informant, and, in fact (4) appellant told the

court that he did not want to know who he is. Finally, no policy reason is suggested which necessitates the disclosure of each and every source of each bit of information in every criminal case.

ARGUMENT

The Narcotics Were Seized in a Search Which Was Incident to a Legal Arrest

The instant case does not involve an informant as the "sole participant, other than the accused, in the transaction charged." Here, the informant was not "... the only witness in a position to amplify or contradict the testimony of government witnesses." Nor did a government witness testify that the source of the information denied knowing appellant "or ever having seen him before." Furthermore, there were no "repeated demands by the accused" for the disclosure of the informant's identity. *Cf. Roviato v. United States*, 353 U.S. 53, 64-65 (1957).

Rather, this case involves nothing more extensive or complicated than a determination of whether knowledge of the facts and circumstances gave the officer "probable cause" to believe that appellant "... had committed or was committing a violation of the narcotic laws. If it did, the arrest, though without a warrant, was lawful and the subsequent search of petitioner's person and the seizure of the found heroin was validly made incident to a lawful arrest, and therefore the motion to suppress was properly overruled and the heroin was competently received in evidence at the trial." *Draper v. United States*, 358 U.S. 307, 310-311 (1959), citing *Weeks v. United States*, 232 U.S. 383, 392; *Carroll v. United States*, 267 U.S. 132, 158; *Agnello v. United States*, 269 U.S. 20, 30; *Giordenello v. United States*, 357 U.S. 480-483.³

³ It is to be noted that the Supreme Court in *Draper* (decided January 26, 1959) did not cite the *Roviato* case (decided March 25, 1957). Nor is *Roviato* cited in the long dissent in *Draper* (358 U.S. at 314-325).

In any event, the Court in *Roviato*, *supra*, pp. 61-62, discussing three cases involving "... the Government's right to withhold the identity of an informer

The law is now quite settled that the facts and circumstances of each case shall control when the issue of probable cause is raised. As is noted by Judge Bazelon in his statement concerning the instant case "It would appear from Draper that when a reliable informer tells an officer that an individual has left town to buy narcotics and is returning by train at a certain time, the policeman's observation of his return is enough to justify an arrest without a warrant." *Jones v. United States, supra*, (Slip opinion, p. 10).⁴

On July 9, 1959, and after the Order in the instant case was delivered, this Court, sitting on Rehearing En Banc, handed down its opinion in *Brandon v. United States*, — U.S. App. D.C. — (No. 14464, July 9, 1959).

Of special note is the statement in the concurring opinion written by Judge Fahy (Slip opinion at p. 13):

"One other matter should be mentioned. Appellant contends that he was denied the right to question an informer on the issue of reliability of information given to the officer who applied for the search warrant. The present case I think does not present any error which justifies any further proceedings because of this matter. The court was not obligated to produce the informer, and no continuance was requested to enable the defense to do so.

who helped to set up the commission of the crime and who was present at its occurrence . . ." refused to establish a "fixed rule".

The Supreme Court, in *Roviaro* (*Id.*, p. 62), stated: "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." In the instant case, completely unlike *Roviaro*, the identity of the informant does not pertain to the defense on the merits and the rulings of the trial court in nowise hampered appellant or his counsel.

⁴ Here, time was of the essence since the information obtained revealed that the train was soon due to arrive. Axiomatic though it may be, it should be noted that narcotics may be easily secreted, and where necessary, quickly destroyed. See *United States v. Kancso*, 252 F.2d 220, 222 (1958); and also 2 U.S. Congressional and Administrative News, 84th Cong., Second Session, 1956, 3274, 3297, 3299. Indeed, the Supreme Court in *Draper* (*id.*, p. 313) stated that there the agent "... would have been derelict in his duties had he not pursued it". Officers Ernst and Somerville were under the same responsibility.

The same conditions attain in the instant case. It will be recalled from the Counterstatement that the trial court was repeatedly told that the defense did not wish to know the name of the informant. This, coupled with the statement by the prosecutor that dangerous conditions prevailed in the courtroom, defeat the force of appellant's present contentions.⁵

The full extent of appellant's activities is not demonstrated and it is not argued that the Officer had probable cause for an arrest prior to the time he observed appellant in the Union Station Concourse. However, at the time appellant alighted from the New York train and was personally observed by Officer Somerville—thereby corroborating the information previously given by an informant of absolute reliability for over five years—there was then probable cause and the subsequent arrest was within the limitations imposed by the Fourth Amendment. The existence of such probable cause is the sole issue in this case. And under general principles of law and under *Draper* no reason warrants the relief sought by appellant.

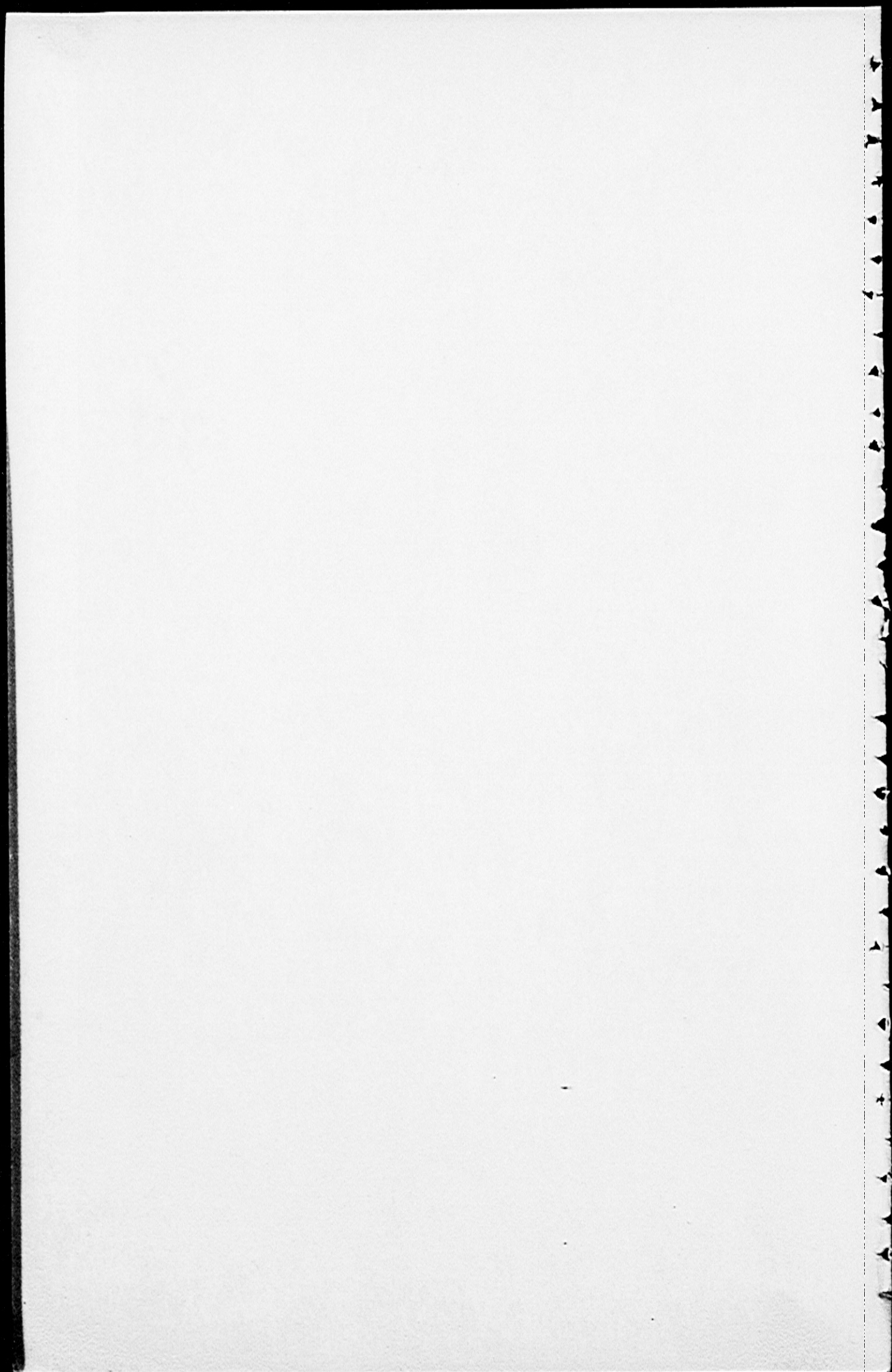
CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

OLIVER GASCH,
United States Attorney.

CARL W. BELCHER,
LEWIS CARROLL,
*Assistant United States
Attorneys.*

⁵ It should be noticed that Officer Ernst did not testify at the trial and no request for his appearance, either for the defense or for the Government, was made.



**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 15,184

FILED

OCT 30 1959

Joseph W. Stewart

CLERK

ANDERSON JONES, Appellant

v.

UNITED STATES OF AMERICA, Appellee

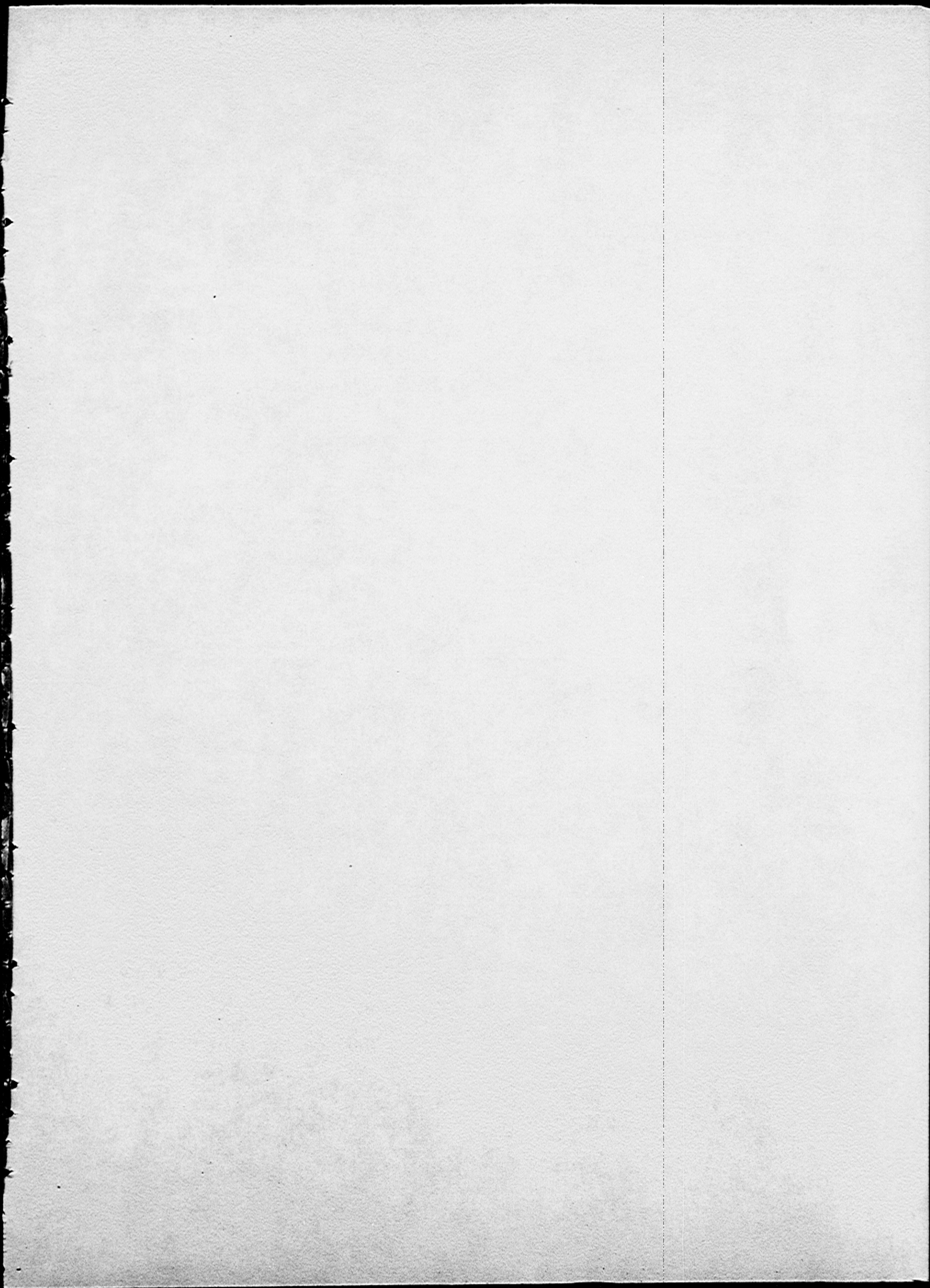
Petition of Appellant For Rehearing
By The Court En Banc

812

**Philip A. Fleming
POGUE & NEAL
730 Southern Building, N. W.
Washington 5, D. C.**

**Counsel for Appellant
(Appointed by this Court)**

October 30, 1959



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANDERSON JONES,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

No. 15,184

PETITION OF APPELLANT FOR REHEARING
BY THE COURT EN BANC

Comes now the appellant, Anderson Jones, by counsel appointed by this Court, and, being aggrieved by the decision of this Court handed down on October 15, 1959, hereby respectfully petitions this Court for a rehearing by the Court en banc. In support thereof he respectfully states unto the Court that:

I.

Appellant prosecuted this appeal following the issuance of an order of this Court granting him leave to appeal in forma pauperis. Jones v. United States, ____ U.S. App. D.C. ____, 266 F.2d 924. The majority of the Division of this Court which voted to allow appellant to proceed on appeal without prepayment of costs could have done so only on the basis that the appeal herein presents a reviewable issue of law which is not plainly frivolous. The majority of the Division of the Court which heard the case on appeal has rejected this finding, thus reversing the earlier order herein, saying:

"It is abundantly clear on the full record now before us that the appeal at government expense was improvidently granted, and it is dismissed as frivolous." (Page 2, slip opinion)

It seems to counsel assigned to represent appellant herein that to dispose of the appeal in this manner is both erroneous and unsound, hence the October 15, 1959 decision herein should be recalled and reconsidered. The following reasons fully support this contention:

1. In dismissing this appeal as "frivolous in the extreme," "improvidently granted," and deserving of "no more than a bare order," the Court has chipped away much of the substance of Ellis v. United States, 356 U. S. 674 (1958), the controlling case on this point. In Ellis, the Supreme Court said:

"The only statutory requirement for the allowance of an indigent's appeal is the applicant's 'good faith.' 28 USC sec. 1915. In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous.... Unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, ... the request of an indigent for leave to appeal in forma pauperis must be allowed." (Emphasis supplied)

In the statement of Judge Bazelon alone on the granting of this Court (Judges Miller, Bazelon and Burger; Judge Miller dissenting) of leave to appeal in forma pauperis in this case, Jones v. United States, supra, the Ellis test was stated as follows:

"We are required to grant the petition if the appeal presents a question which is not plainly frivolous."

This Court has reaffirmed the Ellis doctrine as recently as June 4, 1959, in Young v. United States, No. 14288, D. C. Cir., wherein a majority of the Court affirmed the judgment below rather than dismiss the appeal as having been improvidently granted, as was urged by Judge Burger in a separate opinion which concurred only in the result. In Young the Court not only cited Ellis as the controlling precedent, but also said:

"Our views are more fully set forth in Jones v. United States, Misc. 1103, Statement by Circuit Judge Bazelon of his position in voting to grant the petition for leave to appeal in forma pauperis. (Slip opinion, pp. 1-5, filed April 30, 1959)," (Page 2, slip opinion)

Hence this Court, albeit for an abbreviated period, not only did not feel that this appeal was "plainly frivolous," but cited and adopted the views of Judge Bazelon as set forth in pages 1-5 of the April 30 slip opinion herein. Nor did the District

Court feel that the appeal is "plainly frivolous," for Judge McGarraghy did not certify that the appeal was not taken in good faith, nor did he state that it was plainly frivolous, although he did deny appellant's petition in the court below. The United States Attorney did not move to dismiss this appeal, either, although he did oppose it as frivolous prior to the April 30 order granting the petition for leave to appeal at government expense.

2. In disposing of this appeal in this manner, the Court has overlooked the fact that, as a practical matter, grounds for an appeal which appeal "...frivolous to one judge may constitute reversible error in the eyes of another." (Statement of Judge Bazelon, Misc. No. 1103, footnote 5 at 266 F.2d 926.) Judge Bazelon also points out that such differences of opinion may occur within divisions of this Court, as is well illustrated by the decision herein of October 15. That decision indicates that as of the time of its adoption, two judges -- Judges Burger and Bastion -- favored dismissing this appeal as having been improvidently granted, while the third judge -- Judge Edgerton -- would remand the case to the District Court for a supplemental hearing on appellant's motion to suppress. However, prior to the October 15 decision herein, Judge Burger had, on separate occasions, voted to (a) deny the petition for leave to appeal at government expense (Order of March 9, 1959, Jones v. U. S., supra,) on the one hand, and to (b) allow the petition for an appeal at government expense (Order of April 30, 1959), on the other hand. The position taken by Judge Burger in the October 15 opinion herein, therefore, represents a second major shift (within seven months insofar as he is concerned, on the issue of "frivolousness." Appellant submits that this alone constitutes sufficient reason why the dismissal of this appeal should not be permitted to become effective, for not only has there been disagreement among members of this Court and among members of the divisions of this Court which have heard the in forma pauperis petition and the appeal, but there has also been considerable shifting of position

by the one Judge who heard both phases of this case. In this context, with established differences of opinion represented on this Court, it cannot fairly be said that this appeal is "frivolous in the extreme," as the Court said in its October 15 decision, or that it is even "plainly frivolous" within the meaning of Ellis v. United States, supra.

3. In addition to the foregoing, appellant submits that although individual members of the Court have from time to time stated their respective views as to what the Court's policy should be toward indigent appeals, a statement of such policy by the Court en banc is long overdue. The appeal herein, because it was first allowed at government expense and then dismissed, illustrates forcefully what can happen where more depends on the individual policies of the judges sitting on the Division which rules on the petition or hears the appeal than on any stated policy of the Court as a whole. Certainly a matter of such importance warrants reconsideration by the Court en banc so as to preclude subsequent timely and burdensome redeterminations of the "frivolous" issue in other cases, as well as in the case at bar. As Judge Edgerton pointed out in a dissenting opinion in Cash v. United States, 104 U.S. App. D.C. 265, 275, 261 F.2d 731, 741, judgment vacated, 1958, 357 U.S. 219:

"The United States cannot afford to let poor defendants take criminal appeals that the rich could take. It cannot afford to do otherwise. And the burden of prosecuting, defending, and deciding appeals, though it is greater, is not inordinately greater than the burden of prosecuting and deciding disputes ... over the question whether an appeal should be made possible."

Judge Bazelon, speaking for himself in a separate statement accompanying the order granting appellant leave to appeal at government expense herein, emphasized the same point, as follows:

"If time of bench and bar is spent in review of cases lacking in merit, it is the price we must pay for a system of justice that shields the poor man from 'indidious discriminations.' We cannot review the cases which prove to have merit without reviewing some which may not.... Until (Congress provides an adequate solution)...in predicting which appeals may prove valid, our concern for the worth and dignity of every individual dictates that we had best err on the side of indulgence." (Footnote omitted) (266 F.2d 924 at 926, 927)

However, Judge Burger, dissenting in Young v. United States, supra, roundly criticized this approach, noting:

"Arguments pitting the 'poor' against the 'rich' are no answer to the hard facts which confront the courts and will continue to confront the courts until an adequate public defender system is developed. ~~Such a public defender system is not yet developed.~~

"In 'stretching the cloth' to cover appeal for every conviction, as some would have us do, we may well be taking the risk that really meritorious cases are not adequately presented and considered or are unreasonably delayed....Until such time as Congress provides mandatory review, we should and indeed are obligated to designate a frivolous appeal as frivolous."

See also Chief Judge Prettyman's dissent in Surratt v. United States, ____ U. S. App. D.C. ____, 262 F.2d 691 (1958).

4. The decision of the majority of the Division of the Court which heard the case on appeal suggests that the "frivolousness" of the appeal could not be ascertained until the full record was before the Court. Appellant submits that this implication is erroneous, however, because the "full record" as such -- i.e. the transcript below -- was before the Court in the Misc. 1103 proceeding on the petition to proceed with an appeal at government expense. Moreover, it had been available to the Court since January 26, 1959, following its preparation at government expense pursuant to this Court's order. The record before this Court has not changed. What has changed is the analysis of that record by the Court.

In view of the foregoing reasons, appellant urges the Court to recall and reconsider its ruling dismissing the appeal herein, and to hold that the issue presented is not frivolous within the meaning of Ellis v. United States, supra.

II.

The Court has determined that there was probable cause for appellant's arrest without a warrant, stating that:

"In light of undisputed evidence the contention that there was no probable cause is frivolous in the extreme. Indeed under the decided cases his arrest would have been proper independent of the arresting officer's knowledge of the then pending investigation of appellant's suspected narcotics activities, or of his prior convictions...." (Citations omitted). (Slip opinion, page 4)

Appellant's contention that the Court below could not properly determine that there was probable cause for appellant's arrest without requiring disclosure of the identity of the informer whose report was claimed by the arresting officer to constitute such cause was rejected. Appellant submits that because the disposition of this point by the majority of the Division of the Court which heard the case is erroneous as a matter of law and unsound as a matter of policy, it should be recalled and reconsidered for the following reasons:

1. The arresting officer himself -- the man in the best position to reveal what the basis for his action was -- testified at the pre-trial hearing on a motion to suppress the evidence that the arrest was made on the basis of the information given him by Detective Ernst (JA 18-19). He also testified that he had no further information regarding the appellant. He did not state that he had any information derived from the investigation of appellant then underway on which to make an arrest, nor did he testify that his knowledge that appellant had a record, including two prior narcotics convictions, was an element in his decision to make the arrest. Appellant concedes that the arresting officer probably did not forget either of these two facts, but his testimony indicates that whereas he had been suspicious of appellant for some time insofar as narcotics violations were concerned, he did not act on his suspicions until the information from the informer came in. Accordingly, while the informer's tip may not have been the sole basis for appellant's arrest, although Officer Somerville said it was, it certainly was the predominant factor. As Judge Edgerton points out in his dissent herein:

"It does not appear that there was any evidence, apart from the confidential communication, to establish probable cause for arresting the present defendant. An informer told the police that the defendant would arrive in Washington by a certain train and would be carrying narcotics. The arresting officer testified that the arrest was 'based on that information,' and that he did not have 'any other information concerning the defendant, one way or the other.' An investigation of the defendant was underway but is not shown to have turned up anything.

It follows that unless the police reasonably believed that the informer was reliable, the arrest was without probable cause and therefore unlawful. In that case the seizure of the narcotics was unlawful and they should not have been admitted in evidence." (Slip opinion, page 8)

For a similar view of the evidence contained in this record, see Judge Bazelon's statement, supra, 266 F.2d at 927. The Court in its October 15, 1959 decision has, therefore, notwithstanding the uncontradicted facts of record which show that the arresting officer made the arrest "based on ... information" derived from the informer, lumped the prior convictions, the pending but unproductive investigation, and the informer's tip all together in an effort to retroactively reconstruct Officer Somerville's thinking as it might have been at the time of the arrest. Appellant submits, however, that the record does not permit such a reconstruction, for the underlying fact question is not what the arresting officer's evaluation might have been, but what it actually was at the time of the arrest. The best evidence of what it was, is, of course, Officer Somerville's testimony.

2. The Court has ruled that Roviaro v. United States, 353 U.S. 53 (1957), relied upon by appellant and by Judge Edgerton in his dissent, is "not at all in point" because in Roviaro the informer helped to set up the commission of the crime and was present at its occurrence. In the first place, appellant has not heretofore taken the position that Roviaro is on all fours with the case at bar, nor does he intend to do so now. Appellant's contention is, rather, that the principle enunciated by the Supreme Court in Roviaro clearly extends to this context, because it is a principle based on fundamental fairness and procedural due process. That principle is that where the disclosure of an informer's identity may be helpful to the defense in the preparation of its case because the information obtained from the informer is essential to the prosecution's case, the Government's informer privilege must give way to the defendant's need for disclosure. Surely this is the case here, for apart

from the narcotics obtained as a result of the informer's tip, the government had no case against appellant. In the second place, the Court's attempt to distinguish Roviaro from the case at bar falls of its own weight, because no one knows whether or not the informer in this case helped to set up the commission of the crime, or was present at its occurrence. The government conceded that Officer Ernst -- who has "known" the informer for five years -- does not even know the informer's full name, but can refer to him only by a "certain nickname" (JA 11). Therefore, until there has been disclosure, neither the government nor the Court can do more than guess as to the role the informer played in the commission of the crime involved herein.

3. In concluding that there was probable cause for appellant's arrest, the Court relies in large part upon Draper v. United States, 358 U.S. 307 (1959), and to a lesser extent upon Brandon v. United States, ____ U.S. App. D.C. ____, (No. 14464, decided July 9, 1959). Although the fact situation in Draper is "strikingly similar" to that at bar, in relying on Draper the Court has to "stretch" to dispose of this case, for in Draper the identity of the informer was disclosed, unlike the case at bar. The whole thrust of Draper is that on facts such as these, where the information comes from an informer who is in fact reliable, there is probable cause for an arrest without a warrant. In Draper the informer was not only known, but he had been engaged as a "special employee" of the Bureau of Narcotics at Denver, and was paid sums of money from time to time for his services. Accordingly, no argument could have been made in that case regarding disclosure, for disclosure was not in issue. The same is true of Brandon, supra, for at page 7 of the slip opinion, in disposing of defendant's contention that a search warrant had not been validly issued, this Court pointed out that "The identity of the informant was promptly disclosed." The defendant, moreover, later testified that he knew the informant. Therefore, both Draper and Brandon are essentially irrelevant to a proper determination of the case at bar.

4. Implicit in the Court's ruling on this point is the assumption that had time permitted, Officer Somerville could have obtained an arrest warrant. However, Officer Somerville himself testified that he had no other evidence apart from the informer's tip on which to base the arrest. Appellant submits that no warrant for his arrest could have been obtained under these circumstances, because Officer Somerville had no evidence -- apart from the word of the informer -- that appellant was committing a crime. The fact that appellant walked out of Union Station with a brown paper bag in his sweater is not evidence of any crime, nor is the fact that he was reading a newspaper at the time Officer Somerville stopped him. As a result, Officer Somerville did not have any evidence, apart from the knowledge of appellant's prior convictions and the pending but unproductive investigation, as to which he could have taken an oath had he gone to a magistrate for a warrant, that appellant had committed a crime. Neither Officer Somerville nor Officer Ernst knew the grounds on which the informer based his conclusions, and the record is silent as to any effort on the part of either to attempt to find out what they were. As a result, they could swear only to the fact that the informer had made the accusation. They could not present, on information and belief, any facts which the informer disclosed, hence it is appellant's position that no magistrate could issue a warrant on the mere word of an officer, without more. As Justice Douglas pointed out in his dissent in Draper, supra,

"We are not justified in lowering the standard when an arrest is made without a warrant and allowing the officers more leeway than we grant the magistrate."

5. Appellant further contends that the effect of the Court's opinion of October 15, 1959 herein is to unduly expand -- within this Circuit, anyway -- the rule in Draper v. United States, supra. Such an expansion cannot help but have an undesirable effect on law enforcement officers, for henceforth an arrest without a warrant can be justified on the basis

of an informer's uncorroborated assertions, whether he be identified or not. Where there is no sanction, to require disclosure of an informer's identity under any circumstances, the police will quite understandably rely more and more on such informers. The net result, of course, is to give the informer the function normally reserved to courts: that of testing whether or not the arrest is based on probable cause. Moreover, as Justice Douglas observed in his dissent in Draper, supra:

"If the word of the informer on which the present arrest was made is sufficient to make the arrest legal, his word would also protect the police who, acting on it, hauled the innocent citizen off to jail."

In view of the foregoing, this Court, sitting en banc, should recall and reconsider its ruling that not only was there ample probable cause to support the arrest without a warrant herein, but that "It would be difficult to imagine a more conclusive case of probable cause and reasonable grounds for arrest."

III.

Counsel assigned to represent appellant on this appeal presented the point that the disclosure of the informer's identity was essential so that his reliability would be tested judicially rather than accepted solely on a policeman's word, even though appellant's counsel below may have acquiesced when the trial court sustained the claim of privilege by the government. Counsel submitted the point for consideration by this Court on the ground that counsel below again raised the question of appellant's right to disclosure, thereby placing the point in issue on appeal (JA 12, 24, 29-30); or, in the alternative, on the ground that the point comes within the scope of Rule 52(b), Fed.R.Crim.P., which authorizes the Court to notice plain errors or defects affecting substantial rights. Because the October 15, 1959 decision dismissed the appeal, the Court did not address itself to this point. However, appellant submits that on rehearing the Court should hold either that the refusal of the court below to suppress the narcotics was plain error affecting substantial rights within the meaning of Rule 52(b), thus entitling appellant to a new trial, or that the case should

the case should be remanded to the District Court for a supplemental hearing on the appellant's motion to suppress, so as to rectify the lower court's error. As Judge Edgerton put it in his dissent herein, such a remand would be "In the interest of the fair administration of criminal justice." Certainly the exercise of such discretionary authority by the Court is particularly appropriate in this case, where the victim of the error of the court below is deprived of his liberty for a substantial period of time.

WHEREFORE, counsel for appellant appointed by this Court respectfully submits that the Court should rehear the instant appeal en banc and reconsider and rule on the foregoing points.

Respectfully submitted,

Philip A. Fleming
Counsel for Appellant
(Appointed by this Court)

October 30, 1959

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition of Appellant for Rehearing By The Court En Banc is presented in good faith and not for delay.

Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

A copy of the foregoing Petition of Appellant for Rehearing By The Court En Banc was served personally upon the attorney for appellee, the United States Attorney, United States Courthouse, Washington 1, D. C., by the undersigned this 30th day of October, 1959.

Philip A. Fleming
Counsel for Appellant
(Appointed by this Court)

October 30, 1959